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In the Supreme Court of the United States

OCTOBER TERM, 1985

LOWENE R. CLEMENTE, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

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Petitioner contends that she is entitled to bring a *Bivens* action against the United States and the respondent federal officials on the ground that several of the respondent officials allegedly incorrectly processed her employment discrimination claim.

1. a. In May 1977, petitioner, a federal employee assigned to the data processing section at the Vandenberg Air Force Base in California, was released from her competitive civil service position because a modernization in the data processing equipment used at the base rendered that position obsolete. Petitioner was offered and she accepted a different position that was one grade below her former civil service level. However, petitioner also sought to pursue her administrative remedies, claiming, inter alia, that she was a victim of racial discrimination. In March 1979, the Air Force rejected petitioner's claim on the ground that her complaint was untimely. Pet. App. 4-5, 41-51, 165-166.

In October 1979, petitioner filed suit in the United States District Court for the Central District of California against the United States, the Department of the Air Force, and the Secretary of the Air Force, raising her racial discrimination claim among others. In April 1980, the district court held that petitioner's failure to pursue her administrative remedies in a timely fashion should be excused, and the court remanded the case to the base personnel office with instructions to process petitioner's claims (Pet. App. 151-164; 488 F. Supp. 854). Defendants appealed, but the court of appeals dismissed the appeal on the ground that the district court's order was not final for purposes of 28 U.S.C. 1291 (Pet. App. 145-150).[1]

b. On remand, the Air Force conducted an investigation and ultimately concluded that petitioner's claim of discrimination was groundless. Petitioner thereafter reopened her original suit by amending her complaint to include several new defendants and to assert *Bivens* claims against both the original and the newly-added defendants. See *Bivens* v. *Six Unknown Named Agents,* 403 U.S. 388 (1971). Petitioner claimed that the individual defendants had violated her due process rights by limiting their investigation to her complaint of discrimination and by conducting an allegedly perfunctory investigation of that complaint. Pet. App. 12-13, 62-70.

Following a bench trial, the district court rejected petitioner's claim that she was the victim of discrimination, but held that petitioner's rights under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, were violated, on the ground that respondents had retaliated against her for having filed her discrimination complaint (Pet. App.

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[1]However, the court of appeals vacated the district court's award of attorneys' fees to petitioner, on the ground that petitioner was not a prevailing party (Pet. App. 149-150).

72-78; 568 F. Supp. 1150). The court further held that petitioner's due process rights were also violated because respondents had limited their investigation to petitioner's complaint of discrimination, which, the court stated, was inconsistent with the court's April 1980 order (Pet. App. 94-114). The court awarded petitioner compensatory damages, punitive damages, attorneys' fees, and costs against the United States and the individual respondents (*id.* at 123-126, 128-130, 141-143). Respondents then filed a notice of appeal and moved in the district court for a stay of that court's judgment pending appeal. While respondent's motion was pending, the district court issued an order to show cause why respondents should not be held in contempt and later entered an order simultaneously denying respondents' motion for a stay and holding respondents in contempt. *Id.* at 29-30.

c. The court of appeals reversed the district court's judgment in all respects, vacated the award of compensatory and punitive damages, the contempt citation, and the award of attorneys' fees and costs, and remanded petitioner's Title VII retaliation claim to the district court for further proceedings (Pet. App. 1-37; 766 F.2d 1358). The court held that sovereign immunity barred petitioner's *Bivens* claim against the United States (Pet. App. 14-17) and also held that petitioner could not bring a *Bivens* action against the respondent federal officials because the available civil service remedies foreclosed any *Bivens* claim (*id.* at 18-19, citing *Bush* v. *Lucas*, 462 U.S. 367 (1983)). The court held in addition that petitioner had no liberty or property interest in the correct processing of her employment discrimination complaint (Pet. App. 19-25). Finally, the court noted that, to the extent that petitioner's claims stemmed from actions forbidden by Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, petitioner's *Bivens* claims

were also foreclosed by *Brown* v. *GSA*, 425 U.S. 820 (1976), which held that Title VII provides the exclusive remedy for claims of federal employment discrimination (Pet. App. 34 n.7).

2. The decision of the court of appeals is correct, does not conflict with any decision of this Court or of any other court of appeals, and presents no issue that warrants review by this Court.

Relying chiefly upon *Owen* v. *City of Independence*, 445 U.S. 622 (1980), and *Butz* v. *Economou*, 438 U.S. 478 (1978), petitioner claims that she is entitled to bring a *Bivens* action against the United States and the respondent federal officials on the ground that these officials processed her employment discrimination claim in violation of the district court's April 1980 order and the applicable Air Force regulations. The court of appeals correctly rejected this insubstantial claim.

Petitioner's claim that she is entitled to bring a *Bivens* suit against the United States to recover damages for the allegedly improper administrative processing of her employment discrimination complaint is without merit for several reasons. First, it is settled law that only Congress has the authority to waive the sovereign immunity of the United States. See, *e.g.*, *Block* v. *North Dakota*, 461 U.S. 273, 280 (1983). It necessarily follows that the federal courts may not supplement the relief that Congress has prescribed by deriving a *Bivens* remedy for an alleged violation of the Due Process Clause; in fact, *Economou* recognized that *Bivens* remedies have been created against federal officials largely because sovereign immunity would normally bar a damages remedy against the United States. 438 U.S. at 504-505. There is also no merit to petitioner's suggestion that the Due Process Clause itself constitutes a waiver of sovereign immunity and thereby entitles her to monetary relief from the United States for a due process violation. *United States* v. *Hopkins*, 427 U.S. 123, 130 (1976). Lastly, the court of

appeals correctly held (Pet. App. 16, 33-34 n.5) that nothing in *Owen,* which involved a claim for damages under 42 U.S.C. 1983 against a municipality, purports to hold the United States liable for damages in the absence of an express waiver of its sovereign immunity.

The court of appeals also correctly ruled (Pet. App. 18-19) that *Bush* v. *Lucas,* 462 U.S. 367 (1983), forecloses petitioner's *Bivens* claims against any of the respondents in this case. *Bush* held that the comprehensive substantive and procedural provisions devised by Congress to govern the federal employment relationship made it inappropriate to supplement those remedies by creating a *Bivens* action for constitutional violations. Petitioner has set forth no persuasive reason why *Bush* is not controlling here. In addition, petitioner's claim (Pet. 31-32) that she has a liberty or property interest in the administrative procedures used by the Air Force to resolve her employment discrimination claim was correctly rejected by the court of appeals (Pet. App. 19-25), and that ruling does not conflict with the decision of any other court of appeals.[2]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

DECEMBER 1985

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[2]Petitioner erroneously asserts (Pet. 27-28) that the court of appeals' decision conflicts with *Fitzgerald* v. *Hampton,* 467 F.2d 755 (D.C. Cir. 1972) (en banc). *Fitzgerald* simply held that a former government employee was entitled to a public hearing on his claim that he was illegally fired and did not suggest that the employee could bring a *Bivens* action against the United States or individual federal officials.

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